87-971

SUPREME COURT OF THE UNITED STATES

CASE NO. _____

October 1986 Term

RICHARD L. DUGGER, Secretary,
Florida Department of Corrections,

Petitioner,

v.

ROBERT THEODORE BUNDY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

AND APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

I

CERTIORARI SHOULD BE GRANTED IN THE PRESENCE OF DIRECT CONFLICT BETWEEN THE FLORIDA SUPREME COURT AND THE ELEVENTH CIRCUIT COURT OF APPEALS OVER THE APPLICABILITY OF WAINWRIGHT V. SYKES, 433 U.S. 71 (1977) TO POST-APPELLATE CLAIMS OF INCOMPETENCE TO STAND TRIAL.

II

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE DECISION OF THE ELEVENTH CIRCUIT AND THIS COURT'S DECISIONS IN MAGGIO V. FULFORD, 462 U.S. 111 (1983) AND ANDERSON V. BESSEMER CITY, 470 U.S. ____, 84 L.ED.2D 518 (1985).

III

CERTIORARI SHOULD BE GRANTED TO REVIEW A DECISION OF THE CIRCUIT COURT WHICH COMPELS PIECEMEAL LITIGATION.

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The opinion of the Court of Appeals, Eleventh Circuit, on rehearing, is not yet reported and appears in the appendix as A-1 to A-4. The original panel opinion which reviewed the judgment of the district court appears as Bundy v. Dugger, 816 F.2d (11th Cir. 1987) and is appendixed at A-5 to A-24. The opinion of the United States District Court is appendixed herein at A-25 to A-64.

The decision of the Florida Supreme Court is reported in Bundy v. State/Bundy v. Wainwright, 497 So.2d 1209 (Fla. 1986) and is appendixed at A-65 to A-73.

The original decision on appeal from Mr. Bundy's conviction is reported in Bundy v. State, 471 So.2d 9 (Fla. 1985) Cert. denied, _____U.S._____, 107 S.Ct. 295, 93 L.Ed.2d 269 (1986).

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The original panel decision was rendered on April 2, 1987. Rehearing was denied on May 15, 1987.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VI of the Constitution of the United States provides:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Amendment X provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XIV provides, inter alia:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Title 28 U.S.C. §2254(d) provides:

(d) In any proceeding instituted in a Federal Court by an application for a writ of habeas corpus by a person in custody prusuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit

(1) that the merits of the factual dispute were not resolved in the State Court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) That the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made,

> pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for herinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

Florida Rule of Criminal Procedure 3.850 states:

> A prisoner in custody under sentence of a court established by the laws of Florida claiming the right to be released upon the ground that the judgment was entered or that the sentence was imposed in violation of the Constitution of Laws of the United States, or of the State of Florida, or that the court was without jurisdiction to enter such judgment or to impose such sentence or that the sentence was in excess of the maximum authorized by law, or that his plea was given involuntarily, or the judgment or sentence is otherwise subject to collateral attack, may move the court which entered judgment or imposed the sentence to vacate, set aside or correct the judgment or sentence.
>
> A motion to vacate a sentence which exceeds the limits provided by law may be filed at any time. No other motion shall be filed or considered pursuant to this rule if filed more than two years after the judgment and sentence become final unless it alleges (1) the facts upon which the claim is predicated were unknown to the movant or his attorney and

could not have been ascertained by the exercise of due diligence, or, (2) the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

Any person whose judgment and sentence became final prior to January 1, 1987, to file a motion in accordance with this rule.

The motion shall be under oath and include the following information:

(a) The judgment or sentence under attach and the court which rendered the same;

(b) Whether there was an appeal from the judgment or sentence and the disposition thereof;

(c) Whether a previous post-conviction motion has been filed, and if so, how many;

(d) If a previous motion or motions have been filed the reasons or reasons why the claim or claims in the present motion were not raised in the former motion or motions.

(e) The nature of the relief sought;

(f) A brief statement of the facts (and other conditions) relied upon in support of the motion.

This rule does not authorize relief based upon grounds which could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence.

Upon filing of a Rule 3.850 motion, the clerk shall forward the motion and file to the court.

If the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief, the motion shall be denied without a hearing. In those instances when such denial is not predicated upon the legal insufficiency of the motion on its face, a copy of that portion of the files and records which conclusively shows that the prisoner is entitled to no relief, the court shall order the State Attorney to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate. The answer shall respond to the allegations of the motion. In addition it

shall state whether the movant has used any other available state remedies including any other post-conviction motion under this rule. The answer shall also state whether an evidentiary hearing was accorded the movant. If the motion has not been denied at a previous stage in the proceedings, the judge, after the answer is filed, shall determine whether an evidentiary hearing us required. If an evidentiary hearing is not required, the judge shall make appropriate disposition of the motion. If an evidentiary hearing is required, the court shall grant a prompt hearing thereon and the court shall cause notice thereof to be served upon the state attorney, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or is otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment aside and shall discharge the prisoner or resentence him or grant him a new trial or correct the

sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant or his attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules

An appeal may be taken to the appropriate appellant court from the order entered on the motion as from a final judgment on application for writ of habeas corpus. All orders denying motions for post-conviction relief shall include a statement that the movant has the right to appeal within thirty days of the rendition of the order. The prisoner may file a motion for rehearing of any order denying a motion under this rule within fifteen days of the date of service of the order. The clerk of the court shall promptly serve upon

> the prisoner a copy of the any order denying a motion for rehearing noting thereon the date of service by an appropriate certificate of service.
>
> An application for writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this rule, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied himm relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.
>
> Amended Feb. 10, 1977, effective July 1, 1977 (343 So.2d 124667); Dec. 2, 1977 effective Jan. 1, 1978 (353 So.2d 552); Nov. 30, 1984 and Dec. 28, 1984, effective Jan. 1, 1985 (460 So.2d 907); Dec. 19, 1985 (481 So.2d 480).

STATEMENT OF THE CASE AND FACTS

Theordore Robert Bundy kidnapped and murdered twelve-year old Kimberly Leach. The details of his crime are set forth in Bundy v. State, 471 So.2d 9 (Fla. 1985)

cert. denied, _____ U.S. _____, 105 S.Ct. 295, 93 L.Ed.2d 269 (1986) and need not be considered here.

During the time Bundy was awaiting trial in this case, he ws tried, convicted and sentenced to death for the murder of two Chi-Omega sorority sisters in what is called the Chi-Omega case. Bundy v. State, 455 So.2d 330 (Fla. 1984).

An Attorney (Mr. Thompson) served as a member of the defense team in both cases. Mr. Bundy, however, served as co-counsel in this case with Mr. Africano and Mr. Thompson.

Mr. Bundy never raised any "insanity" defense nor would he permit his co-counsel to do so. In the Chi-Omega case, when counsel attempted to raise such a defense Bundy obtained new counsel, Mr. Hayes, to establish his competence. In a special hearing during which Bundy and Hayes

opposed co-defense counsel Minerva and Thompson, Bundy forced both examining mental health experts (Dr. Tanay and Dr. Cleckly) to admit that Bundy was legally sane and competent at the time of the offense and at trial. (Dr. Tanay equivocated because he personally disagreed with the legal standard, but nevertheless conceded Bundy's "legal" competence). The Chi-Omega court found Bundy (who was a law student and both well educated and eloquent) competent to stand trial. At Bundy's request a Faretta hearing ensued in which Bundy quoted Faretta v. California, 422 U.S. 806 (1975) to the Court and won leave to act as counsel. [1]

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[1] Bundy has filed a petition for relief under §2254 in the Chi-Omega case. The District Court originally denied relief without reviewing the record or awaiting a state response. The Circuit Court has remanded that case for proper disposition.

No effort was made to have Bundy declared incompetent to stand trial in this case. No insanity defense was offered in this case. No record indicia of incompetence either before or during trial appeared in this case. Bundy controlled his defense and through legal acumen and some careful theatrics enjoyed some success during trial and voir dire. Bundy orchestrated a sentencing phase hearing wherein a new " co-counsel" was able to provide hearsay "testimony" on the evils of capital punishment under the rubric of final argument. Bundy himself argued eloquently to the jury, again depriving the State of any chance at cross examination.

After losing his appeals, Bundy petitioned for post-conviction relief pursuant to Fla.R.Cr.P. 3.850. Here, for

Bundy v. Wainwright, 808 F.2d 1410 (11th Cir. 1987).

the first time, Bundy alleged that he was "denied" a full and fair hearing on his competence to stand trial. The Florida Supreme Court rejected the claim as one which was procedurally barred. Bundy v. State, 497 So.2d 1209, 1210 (Fla. 1986).

Bundy petitioned for federal habeas corpus relief pursuant to 28 U.S.C. §2254 in the United States District Court. The District Court did not find Bundy's claim to be procedurally barred (though it found Bundy's waiver "highly significant") but, after reviewing the entire trial record (which the court had received several weeks earlier) the District Court concluded that Bundy had:

> " "not presented sufficient evidence to create a 'real, substantial and legitimate doubt' as to his mental competence to stand trial and be sentenced," and, therefore, he was not entitled to an evidentiary hearing on the issue. It would be "a perversion of the

> judicial process" to allow petitioner to waive any challenge to his competence at trial and then permit him a new trial on the grounds that he was not granted a hearing on his competence. Curry v. Wilson, 405 F.2d 110, 113 (9th Cir. 1968)."

Since Bundy established no indicia of incompetence under Dusky v. U.S., 362 U.S. 402 (1960) (per curiam) and Pate v. Robinson, 383 U.S. 375 (1966) and the record was devoid of same, relief was summarily denied pursuant to 28 U.S.C. §2254(d).

When Bundy appealed to the Eleventh Circuit,[2] he was awarded an evidentiary hearing on the rationale that the District Court "improperly weighed" the evidence in

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[2] Which automatically granted Bundy an ex parte certificate of probable cause after one was denied him by the District Court.

the record. While making clear its stance that it (the Eleventh Circuit) was not "in any way" suggesting that Bundy was incompe- ent, the Court ordered a hearing on the single issue of Bundy's competence while retaining jurisdiction over Bundy's remaining claims.

On rehearing, the Circuit Court acknowledged that it erred in failing to find that the District Court had, before it, transcripts of Dr. Tanay's testimony (retracting his written opinion of legal incompetence) and other evidence which, the court admitted, further supported the district court's disposition. Nevertheless, based upon speculation as to the weight of the remaining "evidence", [3] the

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[3] This "evidence" was a) Bundy failing to follow the advice of co-counsel b) Bundy rejecting a plea offer c) Bundy getting married during trial (thus establishing

Court again ordered the (piecemeal) competency hearing.

Also rejected was the State's contention that Bundy's competency claim was procedurally barred.

I

CERTIORARI SHOULD BE GRANTED IN THE PRESENCE OF DIRECT CONFLICT BETWEEN THE FLORIDA SUPREME COURT AND THE ELEVENTH CIRCUIT COURT OF APPEALS OVER THE APPLICABILITY OF WAINWRIGHT V. SYKES, 433 U.S. 72 (1977) TO POST-APPELLATE CLAIMS OF INCOMPETENCE TO STAND TRIAL.

The Eleventh Circuit, as noted in a number of recent certiorari petitions, is unwilling or unable to accept or follow this Court's decisions in Wainwright v. Sykes, 433 U.S. 72 (1977); Engle v. Issac, 456 U.S. 107 (1982) and Smith v. Murray, 477 U.S. _____, 91 L.Ed.2d 434 (1986). Instead, Florida, is being compelled to satisfy the (rejected) "deliberate bypass" test of Fay v. Noia, 372 U.S. 391 (1963), at least in "first warrant" cases. The predictable result of this has been the denial of the State's right to rely upon the will of Congress in enacting §§2254(d)

and "insulation" of the State from what should be controlling decisional law of this Court, rather than the Eleventh Circuit. A collateral consequence has been a totally arbitrary and capricious application of 28 U.S.C. §2254. Compare Bundy v. Dugger, supra and Fallada v. Wainwright, ____ F.2d ____ (11th Cir. June 24, 1987) case no. 86-5185; and Thomas v. Wainwright, 788 F.2d 684 (11th Cir. 1986).

The Sykes-Engle doctrine does not require the State to prove that Theordore Bundy or his co-counsel knowingly and intelligently "waived" a pretrial challenge to (Bundy's) competence to stand trial. What Sykes-Engle requires is satisfaction, by Mr. Bundy, of the "cause and prejudice" test. (A test demeaned as a "guise" by the Eleventh Circuit in Harich v. Wainwright, 813 F.2d 1082 (11th Cir. 1987) at n. 17).

Bundy cannot, and indeed has not tried to, satisfy the "cause and prejudice" test. Bundy refused to permit trial counsel to challenge his competence. In (the earlier) Chi-Omega case, Bundy obtained new counsel (Mr. Hayes) and went to court against his co-counsel (Mr. Minerva and Mr. Thompson) and, through the expert testimony of two witnesses, established his competence. Then Bundy took the extra step of satisfying Faretta v. California, 422 U.S. 806 (1975) and obtained leave to act as his own attorney!

In this case, six months later, Bundy refused again to permit an "incompetence" defense and again appeared as co-counsel per Faretta.

No doctor ever declared Bundy to be legally incompetent under Florida Law. The leading expert, Dr. Cleckly, found Bundy competent. Dr. Tanay agreed with Cleckly

but personally felt that people with personality disorders (like Bundy) "ought to" be deemed incompetent.

Bundy therefore cannot establish "cause" for refusing to raise this issue before (or during) trial and, even if he could he cannot establish "prejudice" since all examiners found him to be "competent". Therefore, the Florida Supreme Court's reliance upon our State procedural bar is justified both on its own standards and the Sykes-Engle standard.

The Eleventh Circuit, acknowledging the prospect of a Fay v. Noia, supra, waiver, rejected bout of hand the Sykes-Engle test, stating that claims of incompetence can be raised "at any time" and require an evidentiary hearing, notwithstanding the "record indicia of incompetence" test of Dusky,

Pate and Drope, [4] if speculation suggests one is needed.

Although the district Court closely followed these cases and found that there was nothing before the court, on the record, to give, cause to suspect Bundy's competence, the Eleventh Circuit "speculated" as to why Bundy would disregard the advice of co-counsel and wondered if an "incompetent" Bundy could "waive" (Fay v. Noia) a competency defense andd, in doing so, cause his co-counsel to similarly "waive" the defense! (See point two of this petition).

As this Court has recognized, it is almost impossible to prove "past sanity" or "past insanity". See Pate, supra; Drope,

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[4] Dusky v. United States, 362 U.S. 402 (1760) Pate v. Robinson, 383 U.S. 375 (1966) Drope v. Missouri, 420 U.S. 162 (1975)

supra. (Instead, in Drope this Court upheld the Missouri Supreme Court's decision to exclude "new" medical opinion and limited the inquiry to record evidence as it existed at the time of Drope's trial). Thus, as the Florida Supreme Court and the United States District Court concurred, Florida stands to suffer a "perversion of justice", Curry v. Wilson, 404 F.2d 110 (9th Cir. 1968) if Bundy is permitted to sandbag a frivolous claim of "incompetence" until almost a decade after his trial, for use after his other appeals have failed.

It is, in fact, ironic (if not an affront to comity) that while the Eleventh Circuit will not apply Sykes-Engle to prevent the "sand bagging" of a state court on a competency issue, the same does not apply when it is the Eleventh Circuit that is itself "sandbagged". Thomas v.

Wainwright, 788 F.2d 684 (11th Cir. 1986).

Florida submits that since Sykes, supra, sets forth a controlling test which is sufficient to protect a truly injured defendant, the procedural bar test should be fairly and consistently applied to all litigants, rather than be arbitrarily and capriciously imposed as the Eleventh Circuit (which openly prefers Fay v. Noia, supra) has chosen.

The federal-state friction being generated by the Circuit's refusal to apply Sykes-Engle is substantial. The Florida Supreme Court and the Eleventh Circuit stand at loggerheads, while almost three hundred death row inmates gamble on which "rule" will be applied to their case. This scenario is hardly constitutional, and cries out for this Honorable Court's attention. For this reason certiorari should be granted.

II

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE DECISION OF THE ELEVENTH CIRCUIT AND THIS COURT'S DECISIONS IN MAGGIO V. FULFORD, 462 U.S. 111 (1983) AND ANDERSON V. BESSEMER CITY, 470 U.S. ___, 84 L.ED.2D 518 (1985).

The medical and legal evidence available to Florida courts and to the United States District Court showed a sane, lucid, oriented defendant who was not only deemed competent by every examining physician but was found competent to act as his own attorney (under Faretta) as well.[5]

Although the District Court did not apply Sykes-Engle, it did examine the record in keeping with Dusky, Pate, and Drope, supra, and found nothing in the

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[5] Bundy was a college graduate and a law student at the time of the murders.

record which created a "bona fide doubt" regarding Bundy's competence. See Drope, supra, at 172-173.

The Eleventh Circuit, after confessing that the evidence does not necessarily establish incompetence and, on rehearing, even referring to the case as "close", ordered an evidentiary hearing on Bundy's "past competence" based upon pure speculation.[6]

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[6] The Court incredibly agreed that Bundy "failed to produce sufficient evidence generating a legitimate doubt as to his competence". Bundy, supra, at 566. However, the Court wants a hearing despite the absence of plain error because, in an evidentiary hearing, it might "weigh" the evidence differently. The Circuit Court cited Dr. Tanay's written report but ignored his sworn testimony, the Court also cited Bundy's failure to obey the advice of co-counsel and his decision to get married before the advisory jury (an excellant strategic move) as speculative grounds for a hearing.

In Anderson v. Bessemer City, 470 U.S. ____, 84 L.Ed.2d 518 (1985) this Court held that a circuit court should not reverse the findings of a district court unless, after examining the entire record, the circuit court was left with a "definite and firm" belief that the lower court erred. Accord, United States v. United States Gypsum Co., 333 U.S. 364 (1947).

The Circuit Court, in this case, did not reach the "definite and firm" conclusion required by Anderson, supra. Indeed, on rehearing the Eleventh Circuit agreed with the State of Florida that it (the Eleventh Circuit) had overlooked key evidence which, in fact, further supported the district court and made the case even "closer". Still, a hearing was ordered despite the absence of "plain error".

Adding to this mistake by the Eleventh Circuit is its total ignoral of the

decisions in Maggio v. Fulford, 462 U.S. 111 (1983) and Sumner v. Mata, 455 U.S. 591 (1982). These cases do not permit federal courts to replace state court findings of fact with their own. No State court found Bundy "incompetent". While Bundy did not challenge his competence to stand trial in the State court, he did request leave to represent himself pursuant to Faretta and was found competent to do so! It is illogical for the Eleventh Circuit to muse that Bundy, while competent to act as his own lawyer, could not competently "be the client".

Thus, Florida again is being denied access to the benefit of the decisional law of this Court. Without finding "error" per Anderson, supra, the court is nevertheless subjecting Florida to a needless evidentiary hearing. Without finding conclusive evidence of incompetence, the circuit court

is rejecting factual determinations on the grounds that it, or a federal district court, might "weigh" the evidence (which the court concedes is "close") differently, in pure defiance of Maggio and Sumner.

While certiorari will not necessarily lie to cure intra-district conflict, it has happened in the past in the presence of an important question and other (inter-district or Supreme Court) conflicts. See e.g. John Hancock Insurance Co. v. Bartels, 308 U.S. 180 (1939); Dickenson v. Petroleum Conversion Corp., 338 U.S. 507 (1948); Maggio v. Zeitz, 333 U.S. 56 (1947).

Here, again, special and important reason exist to accept this case for review. If Furman v. Georgia, 408 U.S. 238 (1972) precludes the states from arbitrarily and capriciously enforcing their laws, it is not unreasonable for the states or the men on death row to hold the federal

courts to the same standard. Clearly, the Florida Supreme Court and the United States District Court have acted in accordance with the law. Certiorari must be granted to compel the Eleventh Circuit to do so.

REASONS FOR GRANTING THE WRIT

III

CERTIORARI SHOULD BE GRANTED TO REVIEW A DECISION OF THE CIRCUIT COURT WHICH COMPELS PIECEMEAL LITIGATION

In Sanders v. United States, 373 U.S. 1, (1963) this Court held that nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation. The Eleventh Circuit has ordered, in disregard of this standard, piecemeal review of Bundy's case.

Mr. Bundy has raised appellate challenges to several district court findings that were rendered without evidentiary hearings, including claims of personal incompetence to stand trial, incompetence to act as his own attorney and the ineffective assistance of (co-) counsel. The Eleventh Circuit has ordered an

evidentiary hearing on the issue of Bundy's competence while reserving jurisdiction (to order additional piecemeal hearings, if desired) over the remaining issues. By this action, the Circuit Court could easily compel the district court to conduct three lengthy, piecemeal, hearings while protracting this litigation over a period of years. In fact, each piecemeal hearing will no doubt generate some additional, overlapping, appeal by the losing side thus creating a "Gordian knot" of interwoven litigation.

Although technically not a "final judgment", the decision at bar is indeed subject to review. Pennsylvania v. Ritchie, ____ U.S. ____, 1 F.L.W. Fed. S. 159 (1987); Cox Broadcasting v. Cohn, 420 U.S. 469 (1975). Certiorari has been granted in the past despite the fact that

the case in question was remanded for a hearing. See Wainwright v. Sykes, 433 U.S. 72 (1977); Florida v. Meyers, 466 U.S. 380 (1984).

In Meyers, Id., certiorari was granted due to the fact that the constitutional issue would be "mooted" if Florida prevailed at the evidentiary hearing and would be incapable of being reviewed if Florida lost. This dilemma is analogous to the "capable of repetition yet evading review" finding in Gerstein v. Pugh, 420 U.S. 103 (1975).

Neither Florida nor the District Court should be subjected to multiple, "interlocutory" evidentiary hearings, ordered individually as the Circuit Court "gets around" to asking for them. The demands of judicial economy as well as concepts of judicial courtesy and comity would require the Circuit Court to

resolve all pending claims and, if necessary, order a single evidentiary hearing.

Pursuant to Rule 17 this Court has the supervisory power to prevent the Eleventh Circuit from piecemealing this case. Pursuant to Rule 18, a pre-judgment petition for certiorari will be granted to review a case pending in Circuit Court upon a showing of "such imperative public importance as to justify the deviation from normal appellate practice".

As we have shown, the Eleventh Circuit has not only ordered a course of piecemeal litigation, it has ordered an evidentiary hearing that is totally unwarranted under the decisional law of this Court. The Eleventh Circuit cannot immunize itself from review by ignoring the binding authority of this Court in a

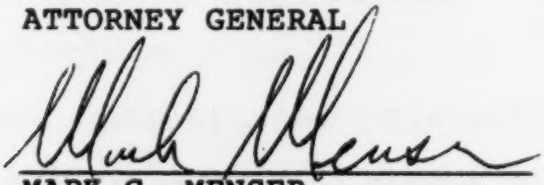
series of "interlocutory" orders which are capable of evading review. Thus, important public, state and federal concerns over the orderly conduct of litigation and the need for finality, see Barefoot v. Estelle, 463 U.S. 880 (1983) combine to press upon this Honorable Court the need to exert its powers of certiorari review for the public welfare and the benefit of the judiciary.

CONCLUSION

Certiorari review should be granted to review the decision of the Eleventh Circuit Court of Appeals, inasmuch as said decision is in express and direct conflict with the decisions of this Court and, in addition, works an arbitrary and capricious injustice upon the petitioners through its ad hoc applications and for non-applications of controlling law.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Overnight Mail to Ms. Polly J. Nelson, Wilmer, Cutler & Pickering, 2445 M Street, N.W., Washington, D.C. 20037-1420, this ____ day of July, 1987.

MARK C. MENSER
Assistant Attorney General

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 86-3773

THEODORE ROBERT BUNDY,

Petitioner-Appellant,

verses

RICHARD L. DUGGER, Secretary,
Department of Corrections,
State of Florida,

Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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(May 15, 1987)

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion April 2, 1987, 11 Cir., 813 F.2d ____)

Before GODBOLD, VANCE and JOHNSON, Circuit Judges.

PER CURIAM:

Respondent-appellee Richard L. Dugger has filed a petition for rehearing and suggestion for rehearing en banc of this court's April 2, 1987 opinion in the above-captioned case. In point I of the petition, the appellee contends that we erred in remanding the case to the district court for an evidentiary hearing on the petitioner-appellant's competency to stand trial because our decision to remand was predicated on a mistaken belief that the transcript from a state court competency hearing was not filed with the district court prior to its rejection of Bundy's

petition for a writ of habeas corpus.[1]

Upon further review of the record in this case, we acknowledge that the transcript from the state court competency hearing was indeed filed with the district court prior to its rejection of Bundy's petition and that we were mistaken in believing otherwise. The transcript was not filed with the rest of the state court record on November 4, 1986, but was attached as an exhibit to the state's response to Bundy's Rule 3.850 motion. All of the papers relating to Bundy's Rule 3.850 proceedings were filed on November 17,

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[1] In addition to the contention discussed above, the state also argues that we erred in remanding this case for an evidentiary hearing because we "misapprehended or overlooked" the legal significance of Bundy's purported waiver of his right to raise a claim of incompetence. We reject this contention and adhere to the portion of our April 2, 1987 opinion addressing the issue of waiver.

1986, the same day that the district court ruled Bundy's habeas petition.

That error notwithstanding, however, we conclude that there remains sufficient evidence in the record to require the district court to hold an evidentiary hearing on Bundy's competency to stand trial. While the addition of the evidence in the state competency proceeding possibly makes this a closer question, our review of the entire record still convinces us that the district court erred in concluding that Bundy was not entitled to an evidentiary hearing on his competency claim.

Accordingly, Dugger's petition for rehearing is DENIED.

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 86-5509

THEODORE ROBERT BUNDY,

Petitioner-Appellant,

versus

RICHARD L. DUGGER, Secretary,
Department of Corrections,
State of Florida,

Respondent-Appellee.

On Appeal from the United States District Court For the Southern District of Florida

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NO. 86-3773

THEODORE ROBERT BUNDY,

Petitioner-Appellant,

versus

RICHARD L. DUGGER, Secretary,
Department of Corrections,
State of Florida,

Respondent-Appellee.

On Appeal From the United States District Court For the Middle District of Florida

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Before GODBOLD, VANCE and JOHNSON, Circuit Judges.

BY THE COURT:

The joint order entered by the court in these cases on April 2, 1987, consolidating them for purposes of a hearing on competency to stand trial is VACATED.

The last paragraph of the opinion of this court entered in No. 86-3773 on April 2, 1987 is VACATED and the following is substituted in lieu thereof:

> Accordingly, we REMAND this case to the district court for the limited purpose of conducting an evidentiary hearing into Bundy's competence to stand trial. The court shall schedule expeditiously and conduct such competency hearing and file its find-

> ings of fact and conclusions of law with this court. We retain jurisdiction over the remainder of this appeal.

In No. 86-5509, it is ORDERED that the proceedings shall be expedited. Should the district court in that case determine that a competency hearing is required, and the court has not yet completed the competency hearing required in No. 86-3773, either party to No. 86-5509 may petition this court to re-consolidate the two cases for purposes of determining competence to stand trial, and this court reserves jurisdiction to act on such a request.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 86-3773

THEODORE ROBERT BUNDY,

Petitioner-Appellant,

versus

RICHARD L. DUGGER, Secretary,
Department of Corrections,
State of Florida,

Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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(April 2, 1987)

Before GODBOLD, VANCE and JOHNSON, Circuit Judges.

PER CURIAM:

Theodore Robert Bundy brings this appeal from a denial of his petition for a writ of habeas corpus. Bundy was convicted and sentenced to death by the Circuit Court

of Columbia County, Florida, for the abduction and murder of twelve-year-old Kimberly Leach. On direct appeal, the Florida Supreme Court affirmed both the conviction and the sentence. Bundy v. State, 471 So.2d 9 (Fla. 1985), cert.-denied, _____ U.S. _____, 107 S.cT. 295 (1986). After the Governor of Florida signed a death warrant scheduling Bundy's execution for November 18, 1986, Bundy filed with the trial court of motion to vacate his conviction and sentence under Fla.R.Crim.P. 3.850. The trial court summarily denied Bundy any relief on November 17. Later that day, the Florida Supreme Court both affirmed the trial court's denial of Bundy's Rule 3.805 motion and denied Bundy's petition for a writ of habeas corpus.

Bundy then immediately filed an application for a stay of execution, a

petition for a writ of habeas corpus, and an application for a certificate of probable cause with the United States District Court for the Middle District of Florida. The state, anticipating that Bundy would file a petition for a writ of habeas corpus, had previously filed the trial record with the district court. Having reviewed the trial record in advance, the district court dismissed, without a hearing, the petition and denied the application for a stay of execution and for a certificate of probable cause. This Court subsequently granted a certificate of probable cause and a stay of execution pending appeal. Bundy v. Wainwright, 805 F.2d 948 (11th Cir. 1986).

In this appeal Bundy raises numerous claims challenging both his conviction and his sentence. Bundy initially contends that he was incompetent to stand trial and

that he was denied a full and fair competency hearing. See Pate v. Robinson, 383 U.S. 375 (1966). A defendant is mentally incompetent to stand trial if he lacks a "'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding'" and if he lacks "'a rational as well as factual understanding of the proceedings against him.'" Dusky v. United States, 362 U.S. 402, 402 (1960). A defendant is not entitled to an evidentiary hearing on his claim of incompetency unless he "presents clear and convincing evidence to create a 'real, substantial and legitimate doubt as to [his] mental capacity . . . to meaningfully participate and cooperate with counsel. . . .'" Adams v. Wainwright, 764 F.2d 1356, 1360 (11th Cir. 1985), cert. denied, _____ U.S. _____, 106 S.Ct. 834 (1986) (quoting Bruce v. Estelle, 483 F.2d

1031, 1043 (5th Cir. 1973)). "The standard of proof is high. The facts must 'positively, unequivocally and clearly generate' the legitimate doubt." Id.

The district court dismissed this claim, finding that Bundy was not entitled to an evidentiary hearing because he had failed to present sufficient evidence raising a legitimate doubt as to his competence to stand trial. In making that finding, the district court first noted that a trial court in Leon County had found Bundy competent to stand trial.[1] The district court then stated that Bundy's failure to raise this claim at trial in this case was "highly significant" and that "[i]t would be 'a perversion of the judicial process' to allow petitioner to waiver any challenge to his competence at trial and then permit a new trial on the grounds that he was not granted a hearing

on his competence."

Admittedly, we must accept the district court's finding that Bundy failed to produce sufficient evidence generating a legitimate doubt as to his competence to stand trial unless that finding is clearly erroneous. Id. However, our review of the record convinces us that the district court erred in concluding that Bundy was not entitled to an evidentiary hearing on this claim.

First, the district court erroneously relied on the finding of competency in the Leon County case because the record of the competency hearing in that case had not been filed with it. A state court's finding that a defendant was competent to stand trial is not entitled to a presumption of correctness unless the state court applied the correct legal standard for determining competency to stand trial and

unless its conclusion that the defendant met that standard is supported by substantial evidence developed at a full and fair hearing. Price v. Wainwright, 759 F.2d 1549, 1551-52 (11th Cir. 1985). Without the record of the competency hearing in the Leon County case before it, however, the district court could not have determined that the Leon County court applied the correct legal standard and that is conclusion was supported by substantial evidence. Consequently, even assuming arguendo that the Leon County court's determination of Bundy's competency to stand trial is relevant to this case and is otherwise admissible in this proceeding, the district court's reliance on the Leon County court's findings of competency was improper.

Second, the district court improperly weighed the evidence in the record.

Although defense counsel's failure to question at trial his client's competency can be highly persuasive evidence that the petitoner's competence to stand trial was not in doubt, Adams, 764 F.2d at 1360; Reese v. Wainwright, 600 F.2d 1085, 1092 (5th Cir.), cert.denied, 444 U.S. 983 (1979), the district court unduly emphasized defense counsel's failure to do so here.[2] As indicated, the trial court in the Leon County case determined that Bundy was competent to stand trial. Because this case and the Leon County prosecution were contemporaneous and because a competency claim in this case would have rested on much of the same evidence that the Leon County court apparently rejected, defense counsel may have concluded that the trial court here also would have denied any relief on a competency claim. He could have reached that conclusion even though he

seriously doubted Bundy's competency to stand trial. Therefore, because trial counsel's failure to raise this claim gives rise to conflicting inferences, the district court attached too much weight to the failure to raise this claim at trial.

In contrast, the district court seemingly ignored strong indicia of Bundy's incompetence to stand trial. After the sentencing jury recommended the death sentence, defense counsel offered to the court the report of Dr. Tanay. The trial court in the Leon County case appointed Dr. Tanay, a clinical psychiatrist, to examine Bundy. Dr. Tanay interviewed Bundy and defense counsel in the Leon County case and examined Bundy's behavior during police interrogations and in the courtroom. As a result, Dr. Tanay concluded that Bundy "lacks a rational understanding of what is facing him" and that he proably lacks

"sufficient present ability to consult with his lawyers with a reasonable degree of rational understanding" and recommended that the court conduct an inquiry into Bundy's competency to stand trial. Such evidence--the uncontradicted opinion of a qualified psychiatrist directed expressly towards the relevant legal standard--is far more significant than defense counsel's failure to raise this claim at trial. The district court, however, failed even to mention Dr. Tanay's report.

In addition, the record contains several instances in which Bundy apparently ignored the advice of his counsel such as when he gave statements to the police and when he reneged on the plea agreement. Furthermore, despite his counsel's urging to the contrary, Bundy refused to offer any mitigating evidence to the sentencing jury. Instead, Bundy insisted on performing a

mock wedding ceremony with his fiancee before them. Such conduct standing alone may not constitute a "history of pronounced irrational behavior" warranting a competency hearing. Pate, 383 U.S. at 386. However, a court must consider the aggregate effect of the indicia of a defendant's incompetence. Drope v. Missouri, 420 U.S. 162, 179-80 (1975). Bundy's behavior throughout this prosecution reinforces Dr. Tanay's conclusion that Bundy lacked a rational understanding of the case against him and that Bundy could not rationally consult with counsel. We believe that the district court gave too little weight to that fact.

Furthermore, it is highly significant that both defense counsel and the state moved for a competency hearing in the Leon County case after Bundy refused to accept a joint plea offer. Bundy's behavior in

rejecting that plea offer was central to the state's decision to request a competency hearing in the Leon County case. Because the joint plea agreement covered both this case and the Leon County case, the trial judge in this case attended the hearing where Bundy theatrically rejected the plea offer. Bundy's behavior at that hearing, atop his already suspect behavior, sufficed to question seriously his competency to stand trial in the Leon County case. It has the same effect here.

Finally, the district court erred in denying a hearing on the ground that, because Bundy did not raise this claim at trial, granting him a hearing now would be a "perversion of justice." A defendant cannot waive his right not to stand trial if he is incompetent. Pate, 383 U.S. at 384; Adams, 764 F.2d at 1359. Thus, a defendant can challenge his competency to

stand trial for the first time in his initial habeas petition and, if he presents facts raising a legitimate doubt as to his competency to stand trial, he is entitled to an evidentiary hearing in the district court. See, e.g., Price v. Wainwright, 759 F.2d 1549, 1553 (11th Cir. 1985); Bolius v. Wainwright, 597 F.2d 986, 988 (5th Cir. 1979). But see Thomas v. Wainwright, 788 F.2d 684, 688 (11th Cir. 1986) (petitioner not entitled to hearing on competency claim raised in second habeas petition where claim was raised at trial and no excuse exists for failure to raise it in first habeas petition).

We do not suggest in any way, however, that Bundy was incompetent to stand trial. That determination can be made only after a full and fair evidentiary hearing. We hold simply that the district court's finding that Bundy failed to present evidence

sufficient to warrant an evidentiary hearing on his competency to stand trial is clearly erroneous.

Accordingly, we REMAND this case to the district court for the limited purpose of conducting an evidentiary hearing into Bundy's competency to stand trial. Furthermore, because of the significant overlap in evidence, we will by separate order, filed contemporaneously with this memorandum opinion, order the competency hearing in the Leon County case CONSOLIDATED with the competency hearing in this case and instruct the district court here to schedule expeditiously and conduct both hearings. We retain jurisdiction over the remainder of this appeal.

[1] During the time Bundy was awaiting trial in this case, he was convicted and sentenced to death for the murder of two Chi-Omega Soroity members in Tallahassee ("Leon County case"). Bundy v. State, 455 So.2d 330 (Fla. 1984). After Bundy reneged on a plea agreement covering both this case and the Leon County case, the trial court in the Leon County case, upon both the state's and defense counsel's request, conducted a competency hearing. As a result of that hearing, the Leon County court found Bundy competent to stand trial. In his habeas petition challenging the Leon County conviction, Bundy claims that he was denied a full and fair competency hearing. This Court has recently remanded Bundy's habeas challenge in that case to the district court for proper consideration under 28 U.S.C.A. § 2254.

Bundy v. Wainwright, 808 F.2d 1410 (11th Cir. 1987).

[2] We emphasize that the inquiry here is limited to whether defense counsel suspected that his client was incompetent to stand trial. Whether the defendant believed he was competent to stand trial is irrelevant for, if a defendant is incompetent to stand trial, his belief that he is able to do so is without import. Cf. Pate, 383 U.S. at 384 ("[I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial.").

We note also that any instructions from Bundy to his trial counsel not to challenge his competency does not foreclose our inquiry. If defense counsel suspects that the defendant is unable to consult with him

"'with a reasonable degree of rational understanding,'" Dusky, 362 U.S. at 402, he cannot blindly accept his client's demand that his competency not be challenged. See Thompson v. Wainright, 787 F.2d 1447, 1451 (11th Cir. 1986) (defense counsel cannot "blindly follow" defendant's instructions concerning his defense, especially where counsel suspects defendant's judgment impaired by "mental difficulties"). Therefore, defense counsel's failure to challenge Bundy's competency may have probative value even though Bundy instructed him not to raise such a claim.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

CIVIL No. 86-968-CIV-ORL-18

THEODORE ROBERT BUNDY,

Petitioner,

v.

LOUIE WAINWRIGHT,

Respondent.

ORDER

At approximately 2:30 p.m. on November 17, 1986, sixteen and one half hours prior to the time Mr. Bundy is scheduled to be executed, the petitioner filed a 183 page petition for writ of habeas corpus asking this court to stay the execution and grant relief to the petitioner. This Court considers the petition filed under these conditions to be abusive. Davis v. Wainwright, 107 S.Ct. 17 (1986).

The Court, however, will give the petitioner's conscientious review of the issues. On November 5, 1986 this Court received an advance appendix, weighing 153 pounds and containing thousands of pages, consisting of the trial transcripts, hearing transcripts, voir dire transcripts, pleadings and motions. The Court, in additino to its other cases, has reviewed this appendix.

PROCEDURAL HISTORY

On February 9, 1978, 12 year-old Kimberley Leach disappeared from Lake City Junior High School after she left a class to retrieve her handbag. After approximately two months of massive search efforts, her partially decomposed body was found on April 7, 1978 in a tin hog shed west of Lake City. Meanwhile, Theodore Robert Bundy was arrested in Pensacola on

February 15, 1978. Bundy, an escapee from a Utal prison by way of Colorado, initially was stopped because he was driving a missing or stolen vehicle. A chain of circumstantial evidence tied Bundy to the Leach disappearance and death, and he was indicted on charges of kidnapping and first degree murder on July 20, 1978. After attempting for three days to select a jury in Suwanee County, the trial judge granted Bundy's motion for change of venue on November 16, 1979 nad transferred venue to the Ninth Judicial Circuit, Orange County, Florida. Voir dire commenced January 7, 1980, and jury selection was completed and the evidentiary phase of trial commenced on Monday, January 21, 1980. The jury, which was sequestered throughout the trial, returned a verdict of guilty on both counts on February 7, 1980. The jury recommended the death penalty, and on February 12,

1980, the trial judge sentenced Bundy to death after finding 4 aggravating circumstances and no mitigating circumstances.

On direct appeal to the Florida Supreme Court, Bundy argued the following grounds with the following results:

1. That the hypnotically refreshed testimony of C.L. Anderson should have been suppressed because the procedures used on him were inherently suggestive, violating due process, and because the use of hypnosis made his testimony unreliable.

Result: The Florida Supreme Court held that hypnotically refreshed testimony is per se inadmissible in a criminal trial, but that hypnosis does not render a witness incompetent to testify to those facts demonstrably recalled prior to hypnosis. The Court held that this rule was prospective, and that, applying the U.S. Supreme Court's harmless-constitutional

error rule, there was no reasonable possibility that the tainted testimony, which consisted of the color and numbers on the victim's jersey and the man's pullover sweater and shirt, might have contributed to the conviction in Bundy's case.

2. That Bundy was denied a representative cross-section of the community by the excusal of cause of jurors opposed to the death penalty.

Result: The Supreme Court held that this issue barred by the failure to raise it in the trial court.

3. The trial court erred in denying Bundy's motion for change of venue or abatement of prosecution.

Result: Bundy failed to specify portions of the record which require a finding of constitutional unfairness as to the character of the jurors selected. He also failed to show that he did not receive

a fair trial because the setting or time of his trial was inherently prejudicial.

4. That the trial court erred in failing to sua sponte inquire concerning the fiber and shoe track evidence to ascertain whether the evidence and testimony on it were both reliable and relevant.

Result: This ground was procedurally barred because Bundy failed to object and failed to demonstrate fundamental error.

5. The trial court erred in denying Bundy's motion for a veiw of the school.

Result: This decision is left to the discretion of the trial court and is presumed correct. Counsel had substantial opportunity to cross-examine Anderson to show his recall was obviously inconceivable, and the view had changed substantially in the two years intervening between the disappearance and trial because a four-

lane highway had replaced the former two-lane road. Therefore, the trial court did not abuse its discretion in denying the motion.

6. The trial court erred in denying Bundy's motion to exclude evidence of flight and the jury instruction on flight.

Result: Evaluating the evidence in light of factors enumerated in Fifth and Eleventh Circuit cases, the Court held that the two incidences of flight occurring two days and six days after the highly publicized disappearance of Kim Leach were properly admitted as circumstantial evidence of guilt and that the jury instruction was proper.

7. That the evidence failed to show that the murder met the requirements for the aggravating circumstance of an "especially heinous, atrocious or cruel" capital felony.

Result: The Court agreed, holding that because there was no specific cause of death, no evidence of a struggle or external fear by the victim and no evidence of a sexual assault before death, the evidence did not support this finding.

8. That the use of his Utal conviction in support of two aggravating circumstances constituted an impermissible doubling of aggravating circumstances.

Result: Because each of the two aggravating circumstances, commission of the crime charged while under sentence of imprisonment and a previous conviction of another capital or violent felony, requires proof of a fact that the other does not, the trial court did not err in finding both circumstances.

9. That the trial court erred in admitting the testimony in the penalty proceedings of a Colorado investigator to

prove that Bundy escaped from jail in Colorado.

Result: The Court held that this evidence was competent and sufficient to establish the aggravating circumstance.

In summary, the Court affirmed the conviction and the trial court's finding of 3 aggravating circumstances and no mitigating circumstances.

On May 21, 1986, Bundy filed a petition for writ of certiorari in the Supreme Court of the United States. His sole ground in the petition was that Bundy was denied his rights to due process, trial by jury and confrontation of witnesses by the Florida Supreme Court's application of the harmless-constitutional error standard to Anderson's testimony. The petition for certiorari was denied on October 14, 1986. The governor signed a death warrant in connection with the Leach murder on

October 21, 1986. This Court received a copy of the advance appendix, consisting of the trial transcript, hearing transcripts, pleadings and motions, on approximately November 5, 1986.

On November 7, 1986, petitioner filed an application for stay of execution based upon Bundy's alleged right to present an application for executive clemency. After a hearing, the state trial court denied the application. Petitioner's motion for collateral relief under Florida Rule of Criminal Procedure 3.850, filed November 14, 1986, raises the following grounds for relief, which were denied by the state trial court on the specified basis:

1. Petitioner was incompetent to stand trial and was denied his right to a full and fair hearing on that issue.

Result: The Court deemed this ground procedurally barred, and noted that to

allow Bundy to attack his competency after waiving any challenge on this ground would be a "perversion of justice." Curry v. Wilson, 405 F.2d 110 (9th Cir. 1968).

2. The petitioner was unconstitutionally denied his choice of counsel.

Result: The trial Court ruled that this ground was procedurally barred.

3. Petitioner's counsel was ineffective in the following respects:

(a) failed to investigate
(b) failed to protect plea agreement
(c) failed to develop important mitigating evidence
(d) ineffective in challenging state's reliance on defendant's prior convictions
(e) ineffective in failing to move for determination on defendant's competency
(f) failed to properly challenge the fiber evidence and failed to object to fiber evidence.
(g) failed to investigate whether an insanity defense was viable

Result: The trial Court held that Bundy is estopped to raise this claim under Faretto since he acted as counsel or co-

counsel. Furthermore, the trial Court listed specific reasons why each claim was without merit.

4. The Court failed to conduct a Faretta inquiry concerning whether defendant should have been allowed to represent himself.

Result: This ground was procedurally barred.

5. The death penalty is disproportionately imposed upon those whose victims are white.

Result: The trial Court indicated that this claim, even if not procedurally barred, did not require an evidentiary hearing, noting that the statistical claims have not been accepted by any state or federal court.

After the trial court denied petitioner's Rule 3.850 motion, he appealed the denial of the application for stay and the

Rule 3.850 motion to the Florida Supreme Court. In addition, Bundy filed a petition for writ of habeas corpus in the Florida Supreme Court on November 17, 1986. After a hearing, the Florida Supreme Court denied the application for stay and the petition for writ of habeas corpus and affirmed the lower court decision on the Rule 3.850 motion.

GROUND A

Petitioner asserts that he was incompetent to stand trial and that he was denied his right to a full and fair competency hearing. He would show that from the time of his arrest in Pensacola through the penalty phase of his trial that he acted as a man bent on self destruction. As examples, petitioner, who had completed a year of law school, answered law enforcement officers in the absence of counsel

after being advised by his public defender not to do so; and chose to represent himself pro se in plea proceedings, resulting in withdrawal of the plea bargain. Petitioner also advances the due process argument that a criminal defendant must be afforded an adequate hearing on competence to stand trial whenever the trial judge has a bona fide doubt regarding the accused's competence. Pate v. Robinson, 383 U.S. 375 (1966); see also State v. Tait, 387 So.2d 338, 341 (Fla. 1980); Mitchell v. State, 289 So.2d 418, 419 (Fla. 1974) (under Florida law, due process requires the trial court to hold a hearing if reasonable grounds exist to believe a petitioner is incompetent). The court notes that, in petitioner's similar case in Leon County, the trial court found petitioner competent to stand trial following a competency hearing.

The test for mental competency is whether, at the time of trial and sentencing, petitioner had "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and whether he had "a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402 (1960) (per curiam). The Eleventh Circuit has held that the procedural due process standard is high. Adams v. Wainwright, 764 F.2d 1356, 1360 (11th Cir. 1985). "[A] criminal defendant is entitled to an evidentiary hearing on his claim of incompetency if he presents clear and convincing evidence to create a 'real, substantial and legitimate doubt as to [his] mental capacity... to meaningfully participate and cooperate with counsel.... The facts must 'positively, unequivocally and clearly generate' the

legitimate doubt." Id. (quoting Bruce v. Estelle, 483 F.2d 1031, 1043 (5th Cir. 1973)); see Pride v. Estelle, 649 F.2d 324, 326 (5th Cir. 1981) (requiring "more than a showing by a preponderance of the evidence" that petitioner might have been incompetent at the state trial).

While petitioner is not procedurally barred in his habeas proceeding from challenging his competency to stand trial, "he is not automatically entitled to a hearing on this claim." Adams, 764 F.2d at 1359. Upon review of the voluminous trial transcript, the court finds it "highly significant" that petitioner's mental competence was not raised during trial or sentencing. Id. at 1360. The court concludes that petitioner has "not presented sufficient evidence to create a 'real, substantial, and legitimate doubt' as to his mental competence to stand trial

and be sentenced" and, therefore, he was not entitled to an evidentiary hearing on the issue. It would be "a perversion of the judicial process" to allow petitioner to waive any challenge to his competence at trial and then too permit him a new trial on the grounds that he was not granted a hearing on his competence. Curry v. Wilson, 405 F.2d 110, 113 (9th Cir. 1968).

GROUND B

Petitioner asserts that he was unconstitutionally denied his choice of out-of-state counsel. When this issue was raised regarding the same counsel in petitioner's state appeal from his conviction in the Leon County murders, the Florida Supreme Court, concurring with the Fifth Circuit, found that denial to appeal pro hac vice was based "upon a reasonably clear standard" and that there was "no abuse of

discretion" by the trial court. Bundy v. State, 455 So.2d 330, 348 (Fla. 1984); see Bundy v. Rudd, 581 F.2d 1126 (5th Cir. 1978), cert.denied, 441 U.S. 905 (1979). Finding no abuse of discretion by the trial court, the Florida Supreme Court also found that this petitioner was not deprived of his Sixth Amendment right to counsel. Bundy, 455 So.2d at 348.

Although this matter was raised at trial, it is not a cognizable issue in this habeas proceeding because it was not raised on direct appeal to the Florida Supreme Court. Johnson v. Wainwright, 778 F.2d 623, 628 (11th Cir. 1985). Failure to raise this claim on direct appeal constituted procedural default and the issue is barred from consideration by this Court. See Smith v. Murray, 106 S.Ct. 2661 (1986); Engle v. Isaac, 456 U.S. 107 (1982).

GROUNDS C & F

Petitioner claims that he was denied his Sixth Amendment right to effective assistance of counsel. In setting forth the standards governing ineffective assistance of counsel, the Supreme Court has held that the "benchmark" for analysing such a claim is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). Reversal of a conviction or death sentence requires a two-prong showing of defective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning a the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant

> must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687.

Petitioner's failure to investigate claim consists of speculative and conclusive allegations which he admits are not supported by any competent investigation by present counsel. The extensive defense, at the trial level, including several independent expert witnesses, refutes this ground. The alleged failure to protect the plea agreement is facially deficient and, as the trial court found, "wholly bereft of logic." The claims with respect to the failure to present mental

mitigation evidence flies in the face of Bundy's own opposition to any mental capacity defense. Moreover, the evidence cited in support of this claim was offset by contrary conclusions of other experts. Finally, the Court cannot conclude on the record of the penalty and sentencing proceedings that, even if counsel was deficient, Bundy has established the requisite "reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

Petitioner's allegations concerning counsel's failure to challenge the constitutionality of Bundy's prior convictions again are facially deficient, and the conviction for the Tallahassee murders has been affirmed. The alleged deficiency in failing to move for a determination of competency or to explore

the insanity defense also is without merit. Review of the record convinces the Court that Bundy was competent. In fact, on occassion he raised both factual and legal issues not previously addressed by the trial court or counsel. Despite a few emotional comments, Bundy's overall demeanor and performance was remarkably dispassionate and competent under the circumstances. Bundy's opposition to challenges to his competency is clear from this record and from references to his contemporaneous case. As to the likelihood of success on the incompetency claim, the finding in the Leon County case was to the opposite effect.

The alleged failure to properly challenge and object to the fiber evidence was rejected by the state trial court, which indicated it would have admitted the evidence in face of the arguments proferred

today. Based upon a review of the arguments at trial, the Court agrees that this ground is highly speculative. Moreover, as the trial court noted, the fiber expert had been qualified as an expert on three prior occasions. From the record it is clear this issue was thoroughly investigated. Finally, Bundy presented evidence based upon similar standards concerning the lack of Bundy's or Leach's hair in the van. Petitioner's ineffective assistance of appellate counsel claims have been rejected seriatiam on the merits herein.

GROUND D

Bundy claims that the trial court failed to conduct a proper Faretta inquiry into whether he should have been allowed to represent himself through critical stages of the proceedings. In Faretta v.

California, 422 U.S. 806 (1974), the Supreme Court recognized that a criminal defendant has a Sixth Amendment righ to self-representation. Once a defendant clearly and unequivocally asserts his rights to proceed pro se, the trial court should satisfy itself that the accused knowingly and intelligently elects to do so. Furthermore, a defendant is entitled to conduct his own defense even if the court doubts his legal expertise or ability, so long as the request is intelligently and clearly made. Id. at 835.

On September 14, 1978 Circuit Judge Wallace M. Jopling conducted a hearing on Defendant's Motion to Appear as Attorney Pro Hac Vice. During that hearing Bundy clearly stated that he wanted to proceed pro se. (Transcript of Hearing pg. 145). In doing so, Bundy cited the Faretta case

and correctly stated its holding.

On page 147-148 of the hearing transcript Bundy states: "I have a Bachelor of Science in Psychology from the University of Washington and two years of law school. I think, however, if the Court will read Faretta, the United States Supreme Court has said that the legal background or legal training of a defendant who wishes to represent himself is not an issue. If the man or woman wishes to represent himself or herself, understandably, knowingly and voluntarily expresses the desire to do so, he or she may exercise that Sixth Amendment right applied to the states through the Fourteenth Amendment and so I don't really think that an inquiry into my background, beyond my stating that I knowingly and voluntarily and understandingly take this step, is necessary."

Accordingly, this Court is convinced

that the trial court satisfied itself as to Bundy's voluntary and intelligent request to proceed pro se and that a proper Faretta inquiry was conducted.

GROUND E

Petitioner, a white male, seeks to have this court stay his execution because he was convicted of murdering a white female.

The Supreme Court has granted certiorari in the case of Hitchcock v. Wainwright, No. 85-6756 (June 9, 1986). However the claim that the death penalty is applied in a racially discriminatory manner is one of many issues, and has been rejected by the Eleventh Circuit in Sullivan v. Wainwright, 721 F.2d 316. There was never any mention of racial discrimination in the trial proceeding, and this court finds this contention totally without merit.

GROUND G

In this ground which mirrors the petition for writ of certiorari to the U.S. Supreme Court, Bundy claims that the use of Anderson's testimony violated his rights to due process, to a jury trial and to a confrontation of witnesses. In addition, Bundy claims that the Florida Supreme Court misapplied the harmless-constitutional error rule in its analysis of Anderson's testimony. The Supreme Court denied certiorari. Moreover, the First, Fourth, Fifth and Sixth Circuits recently have rejected federal constitutional claims on these issues in federal habeas petitions. Beck v. Norris, 801 F.2d. 242 (6th Cir. 1986); Harker v. State of Maryland, 800 F.2d 437 (4th Cir. 1986); Wicker v. McCotter, 783 F.2d 487 (5th Cir. 1986); Claly v. Vose, 771 F.2d 1 (1st Cir.

1985). In applying its decision, the Supreme Court of Florida recited and applied the correct harmless-constitutional error standard, if, indeed, that standard was even necessary. See Schneble v. Florida, 405 U.S. 427 (1972). Bundy merely asks this court to reevaluate the evidence, which is not the proper function of federal habeas review.

GROUND H

In this ground, petitioner claims that the trial court erred in denying the motion to limit death qualification of the jury and in excusing for cause those jurors opposed to the death penalty, notwithstanding their ability to vote for guilt or innocence. The Florida Supreme Court held that this issue was barred by the failure to raise it in the trial court. Not only is this ground procedurally barred, see

Wainwright v. Sykes, 433 U.S. 76 (1977), but the substance of the claim decided against petitioner in Lockhart v. McCree, _____ U.S. ___, 90 L.Ed.2d 137 (1986). The twelve jurors who were finally accepted to try the case all stated they would be fair and impartial to both sides.

GROUND I

Bundy claims that the trial court erred in failing sus sponte to conduct a Frye test when confronted with the fiber and shoe track evidence and testimony. The Florida Supreme Court held that this ground also was procedurally barred, as does this Court. Wainwright v. Sykes, supra. Even if it is not so barred, the ground lacks merit. In Sykes, 433 U.S. at 86 the Supreme Court indicated that the Constitution does not require a voluntariness hearing pursuant to Jackson v. Denno, 378

U.S. 368 (1964), absent a contemporaneous challenge. The Court is not persuaded that a sua sponte determination which is not required under Jackson v. Denno is required under Frye, which arguably does not even establish a constitutionally required standard for the admission of evidence in a state criminal proceeding.

GROUND J

Petitioner contends that the trial court erred in denying defendant's motion for a view. This ground is addressed to an issue of state law and does not provide a basis for federal habeas relief. See, e.g., Carrizales v. Wainwright, 699 F.2d 1053 (11th Cir. 1983). Moreover, the Court is convinced from its review of the transcript of Bundy's trial and the arguments therein on this issue that the trial court's decision was not an abuse of

discretion and did not deny Bundy fundamental fairness, especially in light of the substantial changes to the site such as construction of a four-lane highway. As trial, many photographs of the area were admitted into evidence as well as an aerial photo of the vicinity. Extensive cross-examination was conducted regarding the site.

GROUND K

Bundy argues that the trial court erred in denying his motion in limine to exclude evidence of flight and the subsequent jury instruction on flight based upon this evidence. Initially, the Court notes that this ground also raises state law evidentiary and jury instruction issues, and, consequently, is not subject to federal habeas corpus review. Id. In addition, contrary to the assertions of the

petition, the Florida Supreme Court reviewed the evidence in light of the Fifth and Eleventh Circuit cases petitioner argues and found the evidence sufficient. Again, based on its review of the evidence, this court concurs. The evidence was admissible under the standards set forth in United States v. Myers, 550 F.2d 1036, 1049 (5th Cir. 1977), and United States v. Borders, 693 F.2d 1318, 1325 (11th Cir. 1982), cert.denied, 461 U.S. 905 (1983), and the jury instructions given did not render the trial fundamentally unfair. Carrizales, 699 F.2d at 1055.

GROUND L

In Ground L, petitioner contends that the first two findings of aggravating circumstances in the trial court's sentence involved the same convicted act and thus constituted an impermissible doubling of

the aggravating circumstances. The Florida Supreme Court rejected this claim on direct appeal, holding, pursuant to the test set forth in Blockburger v. United States, 284 U.S. 299 (1932), that these two challenged subsections each required proof of a fact that the other does not. Therefore, the Court upheld the trial court's decision. This Court is convinced that the Supreme Court's decision on this issue is correct.

GROUND M

In this ground, Bundy claims that the trial court erred in denying the defendant's motion to enter life sentence on verdict and to prohibit the penalty phase of trial. The gravamen of this ground is that petitioner unconstitutionally was forced to risk death in order to exercise his right to a jury trial. Petitioner essentially concedes that this ground is

procedurally barred. See Wainwright v. Sykes, supra. Moreover, petitioner's authority for this position is a dissent, joined in pertinent part by only two judges of the Court of Appeals for the Eleventh Circuit. Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985) (en banc) (Johnson, J., and Clark, J., dissenting). Accordingly, this ground is without merit.

GROUND N

In ground N, petitioner argues that he was denied his right to petition for executive clemency in violation of the due process and equal protection clauses of the Florida and United States Constitutions and the eighth amendment to the United States Constitution. The Florida Supreme Court rejected this claim on two grounds: (1) that with regard to executive clemency, which is a matter of executive grace, the

Court must be extremely cautious; and (2) a clemency hearing was held in connection with Bundy's conviction in another death penalty case, and the governor and cabinet found no basis on which to grant him relief. With respect to the second ground, the Supreme Court stated: "We cannot say that the executive branch was required to go through the motions of holding a second proceeding when it could well have properly determined in the first that appellant was not and never would be likely candidates for executive clemency."

A clemency decision is not a statutory right, it is an act of grace to which the Fourteenth Amendment requirements of procedural due process do not apply. Spenkellink v. Wainwright, 578 F.2d 582, 617-619 (5th Cir. 1979). The clear implication in Spenkellink, 578 F.2d at 619, is that the state is not required to

afford petitioner a clemency hearing. Moreover, as the Supreme Court indicated, Bundy already had received one executive clemency hearing, and apparently the executive determined that a second hearing was unnecessary. The state executive's decision on this matter of grace of is not subject to federal habeas review. Id.

GROUND O

In his final ground, Petitioner claims that the jury was prejudiced by pervasive pretrial publicity. Venue originally was proper in Suwanne County after Bundy's election of that county over Columbia County. After the trial court was unsuccessful in obtaining a jury, venue was transferred to Orange County.

In reviewing pretrial publicity, two standards guide analysis of this question: the presumed prejudice standard and the

actual prejudice standard. "Prejudice is presumed from pretrial publicity when pretrial publicity is sufficiently prejudicial and inflammatory and the prejudicial pretrial publicity saturated the community where the trials were held." Coleman v. Kemp, 778 F.2d 1487, 1490 (11th Cir. 1985). This principle is rarely applicable, and is appropriate only "where a petitioner adduces evidence of inflammatory, prejudicial pretrial publicity that so pervades or saturates the community as to render virtually impossible a fair trial by an imparitial jury drawn from that community." Mayola v. Alabama, 623 F.2d 992, 997 (5th Cir. 1980), cert.-denied, 451 U.S. 913 (1981).

The Eleventh Circuit decision in Coleman, 778 F.2d at 1537, emphasizes how rarely presumed prejudice is applicable, and this case falls within the vast

majority of cases to which the presumed prejudice standard does not apply. Although the publicity was extensive, review of the voluminous record convinces the court that petitioner has failed to meet his extremely heavy burden of showing that the presumed standard should apply.

As to actual prejudice, the Florida Supreme Court addressed and rejected petitioner's argument. Recognizing that this issue is a mixed question of fact and law, Patton v. Young, 467 U.S. 1025 (1984); Coleman v. Kemp, 778 F.2d at 1537, after review of the record the Court concurs with the Florida Supreme Court's factual and legal determinations. In Murphy v. Florida, 421 U.S. 794, 799-800 (1975), the Supreme Court indicated that it is sufficient if the jurors can lay aside their impressions or opinions and render a verdict based upon the evidence presented

in court. Each juror in Bundy's trial swore to that effect. Thus, Bundy's claim also fails to establish actual prejudice.

ORDERED and ADJUDGED as follows:

1. The Petition for Writ of Habeas Corpus filed by petitioner, Theodore Bundy, on November 17, 1986 is DENIED.

2. The Petitioner's Motion for Stay of Execution is DENIED.

3. The certificate of probable cause is DENIED because petitioner failed to make a substantial showing of the denial of a federal right.

4. The Clerk of the Court shall enter judgment dismissing this action.

DONE and ORDERED in Chambers at Orlando, Florida, this 17th day of November, 1986 at 10:49 p.m. o'clock.

G. KENDALL SHARP
G. KENDALL SHARP
United States District
Judge

Copies to:

All counsel of record

SUPREME COURT OF FLORIDA

Nos. 69, 615 & 69,616

THEODORE ROBERT BUNDY, Appellant,

v.

STATE OF FLORIDA, Appellee.

THEODORE ROBERT BUNDY, Petitioner,

v.

LOUIE L. WAINWRIGHT, etc., et al., Respondents.

[November 17, 1986]

ADKINS, J.

Theodore Robert Bundy, a convicted murderer who is scheduled for execution November 18, 1986, appeals the trial court's denial of his motion for post-conviction relief filed under Florida Rules of Criminal Procedure 3.850 and his application for a stay of execution, and petitions this Court for a writ of habeas

corpus. We have jurisdiction. Art. V, §3(b)(1), (9), Fla. Const. We affirm the trial court's order, finding no basis on which to grant relief, deny the stay of execution, and deny the petition for habeas corpus.

The facts of this case and the issue rasied on direct appeal are contained in this Court's decision of Bundy v. State, 471 So.2d 9 (Fla. 1985), cert.denied, 107 S.Ct. 295 (1986). In seeking relief under Florida Rule of Criminal Procedure 3.850, appellant challenges the validity of his conviction and sentence of death on the grounds that 1) he was denied a full and fair hearing on his competency to stand trial; 2) he was denied the counsel of his choice; 3) he received ineffective assistance of counsel; 4) he was denied a proper Faretta hearing, as required by Faretta v. California, 422 U.S. 806 (1974),

prior to being allowed to represent himself; 5) the death penalty in Florida is arbitrarily imposed and therefore violates the eighth and fourteenth amendments; and 6) he was unconstitutionally denied a clemency hearing in this case.

We find that the first claim could have been raised on direct appeal, as it was in Scott v. State, 420 So.2d 595 (Fla. 1982), and Lane v. State, 388 So.2d 1022 (Fla. 1980), and is therefore not now properly before this Court for further consideration. Alvord v. State, 396 So.2d 184 (Fla. 1981); Witt v. State, 387 So.2d 922 (Fla.), cert.denied, 449 U.S. 1067 (1980).

The second claim could have been raised on direct appeal, as it indeed was in Bundy v. State, 455 So.2d 330 (Fla. 1984), cert.denied, 106 S.Ct. 1958 (1986), and is therefore now barred from consideration.

We find the claim of ineffective assistance insubstantial. Appellant, fully advised by the trial court of the availability of appointed counsel, chose to represent himself. As noted by the United States Supreme Court in Faretta v. California, 422 U.S. 806, 834 (1974), "[w]hatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'" Further, we have carefully examined the allegations charging inadequancies in the performance of associate counsel, and find that such allegations fail to show the necessity for an evidentiary hearing. The claim therefore fails even the first prong of the test for ineffective assistance set out in

Strickland v. Washington, 466 U.S. 668 (1984).

We find that appellant's fourth claim could have been raised on direct appeal and is therefore barred from consideration. Even if we were to examine the claim, however, we would find it lacking in substance. The trial court conducted an inquiry into appellant's ability to act as how own counsel prior to allowing him to represent himself, and during this inquiry appellant himself alerted the trial court to the teachings of Faretta. We may not now reverse the trial court's finding of appellant's ability to pursue his own representation.

Next, we once again reject the claim that the death penalty is unconstitutionally imposed in Florida. Bundy v. State, 490 So.2d 1258 (Fla. 1986); State v. Washington, 453 So.2d 389 (Fla. 1984).

In the final claim raised under his 3.850 motion, appellant contends that he must be allowed time to prepare and present an application for executive clemency before sentences may be carried out in this case. In the death warrant authorizing appellant's execution, the governor attests to the fact that "it had been determined that Executive Clemency, as authorized by Article IV, Section 8(a), Florida Constitution, is not appropriate." It is not our prerogative to second-guess the application of this exclusive executive function. First, the principle of separation of powers requires the judiciary to adopt an extremely cautious approach in analyzing questions involving this admitted matter of executive grace. Sullivan v. Askew, 348 So.2d 312 (Fla.), cert.denied, 434 U.S. 878 (1977). As noted in In re Advisory Opinion of the Governor, 334 So.2d

561, 562 (Fla. 1976), "[t]his Court has always viewed the pardon powers expressed in the Constitution as being peculiarly within the domain of the executive branch of government." See also Ex Parte White, 131 Fla. 83, 178 So. 876 (1938).

Second, the governor and cabinet held an earlier clemency hearing in relationship to appellant's conviction for the Tallahassee murders and found no basis on which to grant him relief. We cannot say that the executive branch was required to go through the motions of holding a second proceeding when it could well have properly determined in the first that appellant was not and never would be a likely candidate for executive clemency.

We next turn to Bundy's petition for writ of habeas corpus. Petitioner charges ineffectiveness of appellate counsel in their failure to challenge on appeal 1) the

trial court's refusal to admit petitioner's choice of counsel pro hac vice; 2) the court's failure to conduct an adequate Faretta inquiry, and 3) the court's failure to conduct an inquiry into the defendant's competence to stand trial. We have found each of the issues utterly without merit, and can therefore find no deficiency in appellate counsels' failure to raise them.

Accordingly, we deny the petition for writ of habeas corpus. The trial court's denial of the motion to vacate appellant's conviction and sentence is affirmed. The application for stay of execution is denied.

It is so ordered.

McDONALD, C.J., and BOYD, OVERTON, EHRLICH, SHAW and BARKETT, JJ., Concur

NO MOTION FOR REHEARING WILL BE ALLOWED.

An Appeal from the Circuit Court in and for Columbia County, Wallace M. Jopling, Judge-Case No. 78-169-CF, and

An Original Proceeding - Habeas Corpus

Polly J. Nelson and James E. Coleman, Jr. of Wilmer, Cutler & Pickering, Washington, D.C.,

for Appellant/Petitioner

Jim Smith, Attorney General, and Raymond L. Marky, Mark C. Menser and John Koenig, Jr., Assistant Attorneys General, Tallahassee, Florida,

for Appellee/Respondents

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

(2)

No. 87-97

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

Richard L. Dugger,

Petitioner,

v.

Robert Theodore Bundy,

Respondent,

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
Eleventh Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, Theodore Robert Bundy, asks leave to file the attached brief in opposition to Petitioner's Petition for writ of certiorari in forma pauperis. Respondent has been granted leave to so proceed in both the U.S. District Court and U.S. Court of Appeals. Respondent, who is incarcerated in a Florida prison, is in the process of preparing an affidavit in support of this motion and will file such affidavit as soon as possible.

James E Coleman AJM

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RESPONDENT'S BRIEF IN OPPOSITION

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August 17, 1987

QUESTIONS PRESENTED

I. Whether Petitioner has demonstrated the extraordinary circumstances necessary to justify this Court's review of an interlocutory order?

II. Whether a habeas petitioner who asserts his past incompetence at trial is required to show "cause" and "prejudice" to lift a state procedural bar raised by his failure to timely assert his incompetence?

III. Whether certiorari should be granted to resolve a factual dispute between a Federal District Court and the court below as to whether the trial record showed a bona fide doubt as to a habeas petitioner's competency to stand trial?

IV. Whether certiorari should be granted to review the Court of Appeals' decision to remand for a hearing on one issue in a habeas petition while retaining jurisdiction over the remaining issues?

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TABLE OF AUTHORITIES

* Cases or authorities chiefly relied upon are marked by asterisks.

IN THE

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RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

The Petitioner asserts that the jurisdiction of this Court is founded upon 28 U.S.C. S. 1254 (1) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved are set forth in the Petition for Writ of Certiorari at pp. 3-12.

PRELIMINARY STATEMENT

References to the Petition for Writ of Certiorari will be designated "(Ptn. ___)."

STATEMENT OF THE CASE AND FACTS

In January 1980 Respondent was tried in the Circuit Court of Columbia County, Florida for the abduction and murder of a young Florida girl. Before, during and after his trial Respondent exhibited behavior that should have caused the trial judge to doubt Respondent's competence.[1/] Nevertheless the trial judge did not hold a hearing to determine Respondent's competency to stand trial.[2/]

Respondent appealed his conviction and sentence of death to the Florida Supreme Court which affirmed both. Bundy v. State, 471 So.2d 9 (Fla. 1985), cert. denied, 107 S. Ct. 295 (1986). On November 14, 1986 Respondent filed with the trial court a motion to vacate his conviction and sentence under Fla.

1/ For example, Respondent routinely disregarded the advice of his counsel by engaging in long dialogues with the police that barely skirted confession but produced numerous damaging admissions. He jettisoned a favorable plea bargain by carrying on at the plea bargain hearing in an eccentric and irrational manner. At his capital sentencing he refused to allow the introduction of mitigating evidence and instead acted out before the sentencing jury a mock wedding ceremony with his fiancee. See discussion in Bundy v. Dugger, 816 F.2d 564, 567-68 (11th Cir. 1987).

2/ Six months prior to the beginning of Respondent's trial, however, a hearing on his competency was held in a different proceeding, his trial for the murder of two women students at the Chi Omega sorority house in Tallahasee, Florida. That hearing resulted in a finding that Respondent was competent. The hearing, however, lacked elementary due process safeguards. None of the parties to the hearing attempted to show that Respondent was incompetent and his counsel, who believed him incompetent, was not allowed to testify or otherwise to participate. See Bundy v. Wainwright, 805 F.2d 948 (11th Cir. 1986). Moreover, the earlier hearing could not have established Respondent's competency as of the time of his trial in this case.

R. Crim. P. 3.850 (and West Supp. 1987), the Florida statute governing collateral relief. The motion alleged, inter alia, that Respondent had been tried while incompetent.

After Respondent's motion for collateral relief was denied by the trial court he appealed to the Florida Supreme Court, which held a hearing on November 17, 1986 and denied the appeal. That same day Respondent filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 in the Federal District Court for the Middle District of Florida. The Petition, nearly two hundred pages in length and alleging over a dozen claims for relief, was denied by the District Court less than nine hours later.

Among the issues the Petition raised was Respondent's claim that his right to due process of law had been violated by the failure of the trial judge to hold a hearing on Respondent's competence to stand trial. The District Court's denial of this claim rested on its determination that Respondent had "'failed to present sufficient evidence to create a "real, substantial, and legitimate doubt" as to his competence to stand trial and be sentenced.'" Bundy v. Wainwright, No. 86-968, slip op. (M. D. Fla., November 17, 1986) (citations omitted).

Respondent appealed the District Court's denial of the Petition to the Eleventh Circuit. On April 2, 1987, the Court of Appeals issued an opinion reversing the District Court's decision of the competency issue. Bundy v. Dugger, 816 F. 564 (11th Cir. 1987). Acknowledging that the "standard of proof" for Respondent's competency claim was "high," the Court of Appeals concluded that the "strong indicia" of Respondent's incompetence it found in the record nevertheless compelled a hearing on Respondent's competency at trial. Id. at 566-67. It then remanded the

case to the District Court for the limited purpose of holding that hearing and retained jurisdiction over the remainder of the appeal.[3/]

REASONS FOR DENYING THE PETITION

I. PETITIONER FAILS UTTERLY TO DEMONSTRATE THE EXTRAORDINARY CIRCUMSTANCES NECESSARY TO JUSTIFY REVIEW OF THE COURT OF APPEALS' INTERLOCUTORY ORDER.

The instant Petition seeks review of an interlocutory order that set for a hearing a single claim in Respondent's habeas petition. The Court of Appeals' order resulted from its application of well-settled law to an extensive factual record. In asking this Court to redo the Court of Appeals' painstaking analysis, Petitioner willfully ignores the principles governing this Court's exercise of its certiorari jurisdiction.

No difficult legal issues are involved here. Long ago in Pate v. Robinson, 383 U.S. 375 (1966) and then in Drope v. Missouri, 420 U.S. 162 (1975), this Court held that a hearing on a criminal defendant's competency is constitutionally required when sufficient indicia of the defendant's incompetence are known to the trial judge. Respondent's habeas petition alleged a violation of this constitutional right. The District Court, reviewing the lengthy record, found the facts insufficient to generate the need for a hearing. The Court of Appeals, however, found that the same record contained "strong indicia" of the

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3/ Petitioner filed a petition for rehearing in which he asserted that the Court of Appeals had made a critical error in assuming that a part of the record had not been before the District Court when it made its ruling. The Court of Appeals conceded the error but denied the petition, concluding that "there remain[ed] sufficient evidence in the record to require" a competency hearing. Bundy v. Dugger, No. 86-3773, slip op. (11th Cir. May 15, 1987).

defendant's incompetence to stand trial and remanded the case for the hearing required by Pate.

Though Petitioner dresses part of his challenge to the Court of Appeals' action in a novel legal guise, at bottom he simply asks this Court to side with him in his disagreement with the Eleventh Circuit over the proper factual inferences to draw from the record. The resolution of that disagreement implicates none of the considerations that generally guide this Court in the exercise of its discretionary jurisdiction.[4/] Petitioner does not allege that the Eleventh Circuit applied a legal standard that conflicts with that of other Federal Courts. See Rule 17(1)(a), Sup. Ct. R. In fact the Court of Appeals applied the same clear test that other Federal Courts routinely apply in cases such as this. Nor can Petitioner argue that the Court of Appeals' decision conflicts with that of Florida's highest court. Id. The Florida Supreme Court found Respondent's Pate claim barred under state law and did not reach its constitutional merits.[5/] The only conflict the Petition has identified is what he calls the "intra-district conflict" between the District Court and the court below as to whether a hearing is required by the facts. [Ptn. at 31.]

Because Petitioner asserts matters that are important only to the parties in this action, he would have no claim to this Court's attention even if he sought review of a final order. See Rice v. Sioux City Cemetary, 349 U.S. 70, 79 (1955). Here,

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4/ One can doubt whether certiorari would even have been sought in a case involving a habeas petitioner less notorious -- or newsworthy.

5/ Of course Florida's decision not to reach the merits does not conflict with the Court of Appeals' decision to review those same merits since the former is premised on state, and the latter on federal law.

however, Petitioner seeks review of an interlocutory order; he makes no showing that the matters he wishes this Court to review are of "imperative public importance." Rule 18, Sup. Ct. R. In fact the matters raised in this Petition are neither inherently "important," being essentially factual issues confined to this case, nor "imperative," in that they can always be reviewed (if necessary) after the Court of Appeals' final judgment. There is no sensible way to characterize the Court of Appeals' decision to order a hearing in this case as a matter that "require[s] immediate settlement in this Court." Id. Compare United States v. Nixon, 418 U.S. 683 (1974). Even within the narrow compass of Petitioner's own interests, no harm would result from this Court's declining to exercise review until after the Court of Appeals enters final judgment.

II. A HABEAS PETITIONER WHO ASSERTS HIS PAST INCOMPETENCE AT TRIAL IS NOT REQUIRED TO SHOW "CAUSE" AND "PREJUDICE" TO LIFT A STATE PROCEDURAL BAR RAISED BY HIS FAILURE TO TIMELY ASSERT HIS INCOMPETENCE.

Petitioner formulates his initial bid for review in a manner that attempts to obscure his simple disagreement with the Eleventh Circuit's decision of the Pate v. Robinson issue.

Petitioner argues that an incompetent defendant waives his right not to be tried if he fails to assert that right at trial or immediately thereafter.[6/] He cites Wainwright v. Sykes, 433 U.S. 72 (1977) for the proposition that the incompetent defendant must show "cause" and "prejudice" for his failure to assert his own incompetency. Petitioner's novel argument cannot

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6/ The first paragraph of the Petition's discussion sets the tone for the remainder. Petitioner makes, but does not try to document, the serious accusation that the Eleventh Circuit routinely disregards this Court's binding precedents. [Ptn. at 20].

survive this Court's statement in Pate that it is "contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently "waive" his right to have the court determine his capacity to stand trial." 383 U.S. at 384. Petitioner has not cited a single Federal court decision,[7] and Respondent is aware of none, that holds that a post-conviction challenge based on incompetency at trial will be held to have been defaulted by the petitioner's failure to raise it while incompetent.

At most Petitioner seeks a change in the law. But the absurdity, and futility, of the change he suggests becomes apparent when one considers that Petitioner accepts -- as he must -- that a defendant's incompetence is itself sufficient "cause" to satisfy Wainwright. In Petitioner's circular jurisprudence a defendant's right to assert his past incompetency depends upon his having been incompetent. But Petitioner's new criterion adds nothing to the inquiry already required under Pate. A habeas petitioner who shows indicia of past incompetence sufficient to trigger a competency hearing under Pate necessarily satisfies the pointless "cause" hurdle Petitioner seeks to erect.

What Petitioner is really getting at with his invitation to repeat the Pate inquiry becomes evident in his hypothetical discussion of why no "cause" could be shown in this case. He argues that Respondent could not show "cause" for having failed to assert his own incompetency because -- according to Petitioner -- the record is crystal clear that Respondent was competent when tried.[8] Petitioner's logic ignores the fact that

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7/ The sole authority Petitioner cites for his untenable theory is Curry v. Wilson, 405 F.2d 110 (9th Cir. 1968) (incorrectly cited in the Petition as 404 F.2d 110), an inapposite case in which the Ninth Circuit held that a competent defendant was bound by his deliberate decision at trial not to assert a Fifth Amendment claim.

8/ "Bundy therefore cannot establish 'cause' for refusing to raise this issue before (or during) trial and, even if he

[Footnote continued next page]

whether Respondent was or was not competent is the very issue that the Eleventh Circuit has found to require a hearing. Petitioner's question begging cannot resolve this disputed issue here in his favor.[9] His entire "cause" and "prejudice" argument dissolves into simple reiteration of his own opinion as to what the record "really" shows.

III. IT WOULD BE IMPROVIDENT TO GRANT CERTIORARI TO RESOLVE AN "INTRA-DISTRICT" FACTUAL DISPUTE BETWEEN THE DISTRICT COURT AND THE COURT OF APPEALS AS TO WHETHER THE RECORD SHOWS A BONA FIDE DOUBT AS TO RESPONDENT'S COMPETENCY.

Petitioner's second argument similarly disputes the Eleventh Circuit's interpretation of a record that Petitioner contends shows a "sane, lucid, oriented defendant." [Ptn. at 27].

The fact bound[10] nature of Petitioner's disagreement

[Footnote continued from preceding page]

could cannot establish "prejudice" since all examiners found him to be 'competent.'" [Ptn. at 23]

9/ Petitioner persistently bolsters his version of the facts with selective and inaccurate references to the record. For example, he asserts that at the competency hearing in Respondent's companion trial (see Bundy v. Wainwright, 805 F.2d 948 (11th Cir. 1987), "[t]he leading expert, Dr. Cleckly, found Bundy competent. Dr. Tanay [the defense expert] agreed with Cleckly." [Ptn. at 22,23] Actually Dr. Tanay did not agree with Dr. Cleckly that Respondent was competent; to the contrary, he expressed his opinion that Respondent's inability to recognize and act in his own interest showed his likely incompetence. [Transcript of Proceedings before Judge Cowart, June 11, 1978, p. 3638.]

10/ Through gross indifference to, and misrepresentation of, the facts, Petitioner attempts to make it appear that the Court of Appeals was guilty of applying an incorrect legal standard in its review of the District Court's decision. He states that the Eleventh Circuit ordered a hearing despite the "incredibl[e]" fact that it "agreed that [Respondent] failed to produce sufficient evidence generating a legitimate doubt as to his competence.'" [Ptn. at 28, fn. 6] referring to Bundy v. Dugger, 816 F.2d at 566. Had Petitioner only read the next sentence in the opinion he quotes, he would have realized that the sentence he quotes refers to the District Court's finding, a finding the Court of Appeals went on to label "clearly erroneous."

with the court below is apparent in his own interpretation of actions by the Respondent that the Eleventh Circuit found suggestive of incompetence. The Court of Appeals found, for example, that Respondent's refusal to offer mitigating evidence at the sentencing stage of his trial and his performance of a mock wedding ceremony before the sentencing jury showed at least the possibility of his incompetence. But Petitioner sees such behavior as instead an example of Respondent's "careful theatrics," a type of tactical maneuver which, if anything, shows Respondent to have been competent. [Ptn. at 15]

Were this Court now to engage in the comprehensive review of the record required to resolve which of the above assessments is correct, Respondent believes that the Court would agree with the Court of Appeals. But this Court, for good reason, "do[es] not grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925). The lessons that could be drawn from this Court's reappraisal of the facts here would likely not apply far beyond this one case. Indeed, they would not even resolve this case given the interlocutory nature of the Court of Appeals' order.

IV. PETITIONER PRESENTS NO REASON FOR THIS COURT TO EXERCISE ITS SUPERVISORY POWER TO REVIEW THE COURT OF APPEALS' DECISION TO ORDER A PARTIAL REMAND.

As a final ground for review, Petitioner seems to assert that the Court of Appeals for the Eleventh Circuit has run amok; he urges this Court to exercise its supervisory powers to restrain that court. Aside from innuendo, however, he makes absolutely no showing that the Court of Appeal has acted in any way improperly.

The object of Petitioner's hysteria is the Court of Appeals' decision to remand only the competency issue to the District Court while retaining jurisdiction over the remainder of the appeal. Petitioner puts a sinister, indeed wholly incredible, interpretation on this ordinary exercise of appellate discretion.[11/] First, he suggests that the partial remand ordered here is only the first in a "series" of successive partial remands contemplated by the Court of Appeals whose evident purpose[12/] will be to "protract . . . this litigation over a period of years." [Ptn. at 34].

Next, Petitioner argues that the Eleventh Circuit declined to issue a final judgment resolving all the issues in the appeal because it wished to "immunize itself from review by ignoring the binding authority of this Court in a series of 'interlocutory' orders which are capable of evading review." [Ptn. at 36-37] As in the case of his previous accusation, not a scintilla of evidence backs up this astoundingly irresponsible statement. A moment's thought would have informed Petitioner that the Court of Appeals, even if it wanted to, could not

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11/ Petitioner supports his attack on the Court of Appeal's "piecemealing" by citing Sanders v. United States, 373 U.S. 1 (1963), [Ptn. 33]. That case, in which this Court noted that habeas petitioners could be barred from later asserting grounds deliberately withheld in earlier petitions, obviously has no bearing on the Court of Appeals' action here.

12/ Respondent does not pretend to know precisely what guided the Court of Appeals. It seems possible, however, that it had at least the following purposes in mind. First, the competency claim is perhaps the strongest of the claims made in the Respondent's habeas petition; its resolution in his favor would make unnecessary decision of the numerous remaining claims. Second, the Court of Appeals had only a few months earlier reversed a district court decision in a companion case which also involved the issue of Respondents' competency. See Bundy v. Wainwright, 805 F.2d 948 (11th Cir. 1987). Proceeding in that case took place closely in time with those in this case; much of the evidence relevant to a determination of competency overlaps. The Court of Appeals likely believed that a partial remand would promote consolidation of the competency issues in both cases.

"immunize" from this Court its decision to order a competency hearing. If that hearing resulted in habeas relief - surely the only cause for Petitioner's concern -- this Court obviously could review not only the appropriateness of such relief but also the propriety of the decision to hold the hearing.

Petitioner has not cited a single case in which this Court has exercised its certiorari jurisdiction to review the appropriateness of a lower Federal court ordering a partial remand, simply because it was partial; Respondent is aware of none. The fantastic, irresponsible and thoughtless hypotheses Petitioner advances in the Petition provide no reason to deviate from the ordinary principles that counsel deference to the Court of Appeal's excercise of discretion.

CONCLUSION

For the reasons given above, this petition for certiorari should be denied.

Respectfully submitted,

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August 17, 1987

CERTIFICATE OF SERVICE

I, Andrew J. Munro, hereby certify that, on this 17th day of August, 1987, I caused to be delivered by first-class mail, postage prepaid, copies of the foregoing Motion for Leave to Proceed in Forma Pauperis and the attached Respondent's Brief in Opposition, to the following:

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